MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Memo to : Hon. Herman Walz, Lawrence Kasperek, Esq., David Moss, Esq., Howard Relin, Esq.

From : Mary Lou Schloss

Re : Brief on Constitutional Issues in Topfree 7 Case

I am writing this brief pro se on the constitutional issues involved in the Topfree 7 case. In addition, I wish to join in the briefs being submitted by David Moss, Esq., on behalf of Nikki Craft, Kathleen Reilly, Deborah Seymour, Elise Tooley, and Lynn Zicari and by Lawrence Kasperek, Esq., on behalf of Ramona Santorelli.

Section 245.01 of the Penal Law of the State of New York (Exposure of a Person) which makes it illegal for women, but not men, to expose any portion of the breast below the top of the areola in public violates sections of both the United States Constitution and equivalent sections of the New York State Constitution. Since the law is unconstitutional, we are not guilty of violating any valid law.

The specific reasons that the law is unconstitutional are that :

1)it denies women equal protection of the law,

2)it inhibits, as applied in this case, freedom to effectively express important ideas,

3)it is vague and not enforced consistently.

For the purpose of this memorandum, I will assume that the factual allegations contained in the prosecutor's information are true. Any statements concerning the events in Cobbs Hill Park on

June 21, 1986, made in this memorandum should not be construed as admissions of fact but are included to facilitate discussion of the legal issues in this case.

1. EQUAL PROTECTION OF THE LAW

The other six defendents and I removed our shirts in Cobbs Hill Park on June 21, 1986, in order to test the constitutionality of the law on equal protection grounds and to educate the public about the seriousness of this form of discrimination against women. I will show that Section 245.01 denies equal protection of the law, that no important government interest exists which could justify this discrimination, and that, in fact, the current law works against important government and public interests.

The "Exposure of a Person" law clearly denies women equal protection of the law. Requiring women to cover their chests in public is the most visible expression of inequality between women and men - an equality clear to children from a young age.

Men have a right to either cover or expose their chests; women don't. Men can enjoy the sun, water, and wind without a top. Men can swim, have a picnic, or garden topfree. Few men would be willing to give up this right.

It is more likely that women will overheat with exercise if they must wear shirts on hot days. Men with more body surface area exposed are better able to benefit from evaporative cooling.

Requiring women to cover their breasts because of some men's lust is identical in concept, if not extent, to the Muslim requirment that women cover themselves from head to toe in public.

Carol Agate, who teaches a sex discrimination course at UCLA

writes, "The issue is not trivial. The imposition on women is great, the inconvenience real, the stigma pernicious. The message to women and girls is that their breasts are obscene while those of men are not. Exaggerated? Suppose many people found excess exposure of Black skin offensive, so the law required only Blacks to keep their chests covered.... the illogic is self-evident when discussing race, but not when discussing sex." (Los Angeles Times, 5/31/81. Copy enclosed as part of Appendix A.)

The law is entirely sex based. Many women are virtually flat-chested; some men have pendulous breasts. However a flat - chested topfree woman breaks New York State law; a man with pendulous breasts does not. Agate continues, "It is a women's sex alone and not her build that makes the law applicable."

"Sometimes the law is justified as being a simple, nondiscriminatory requirement that all sex organs be covered. But breasts are not sex organs. They are not essential to the process of reproduction; a woman with no breasts can have a baby. Ironically, requiring that breasts be kept covered handicaps their real function." (Ibid)

Female breasts are secondary sexual characteristics which develop at puberty as are men's beards, low voices, and broad chests and shoulders. They have no greater import to love making than do lips or ears which need not be hidden.

Jack Moran, Instructor in Health Science at Skyline College, compares male and female breasts, "Physiologically, men's and women's breasts have the same erotic potential, with virtually identical anatomy.... Similarities include a rich supply of nerve endings, especially within the nipple and surrounding areola. In

addition, the nipples in both sexes have erectile capacity." (Medical Aspects of Human Sexuality, March, 1986, p.85)

Dr. James Leslie McCary, Professor of Psychology at the University of Houston, writes, "The appeal of the breast varies widely from culture to culture and from era to era, and breast size and shape have nothing to do with sexuality, except insofar as psychological factors are concerned. It can not be denied, of course, that both male and female breasts have many nerve endings which, when properly stimulated, often afford sexual excitement and pleasure. But there are an equal number of these endings in small breasts and in large ones. Since the supply of nerve endings is the same, regardless of breast size, it is a simple matter to make the calculation that small breasts are per square inch by far more erogenous than larger ones, and may in fact be a distinctly pleasurable advantage for both man and woman during sex play." (Human Sexuality, Van Norstrand Reinhold, New York, 1973, p.141)

The law discriminates particularly severely against poor women. Often poor women living in the city have no access to private areas where they can sun and swim topfree. They may not have private backyards. The closest private area to Rochester available for women to sun and swim topfree is a half hour drive; no public transportation is available. A woman without a car or who can not afford ground fees is out of luck.

The law might stand if it served an important government interest. It does not. Three justifications for the law are often presented:

1)Women's breasts are obscene.

2)Exposure of women's breasts would incite men to violence toward

women.

3)Exposure of women's breasts would be offensive to community standards, particularly when children are present.

First, women's breasts are not obscene. Women's breasts are regularly seen in art and can legally be exposed when a woman breastfeeds an infant. They can also be exposed in public entertainment. As discussed above, breasts are not genitals. If women's breasts are obscene, men's breasts must also be obscene since some men's breasts are larger than some women's breasts and all breasts are physiologically similar. Furthermore, courts have found that simple nudity is not obscene. (e.g. N.Y. Court of Appeals: People v Price)

There is no evidence that exposure of women's breasts would incite men to violence against women.

In 1970, the Commission on Obscenity and Pornography formed by President Richard Nixon issued a lengthy report reviewing studies on the effects of pornography. (The Report of The Commission on Obscenity and Pornography, U.S. Government Printing Office, Washington, D.C., 1970.) In general they examined the impact of erotica and pornography, not simple nudity. No studies found a positive relationship between exposure to erotica, let alone the sight of women's breasts in everyday situations, and violence. In fact, the Commission found a number of studies that show just the opposite:

1)A study comparing male sex offenders, male nonsex offenders, and a control group of males from the general population found no significant difference in exposure to sexual materials. (Gebhard et al., 1965, p.232 of 1970 Commission Report)

2)Sex offenders' experience with erotic material is substantially

less than that of non-sex offenders and nonoffender adults during preadolescence and adolescence. (Cook and Fosen, 1970; Goldstein et al., 1970; Johnson et al., 1970; p.233-235 of 1970 Commission Report)

3) Early social environments of sex offenders may be characterized as sexually repressive and deprived. Sex offenders frequently report family circumstances in which there is a low tolerance for nudity, an absence of sexual conversation, and punitive or indifferent parental responses to children's sexual curiosity and interest. (Amir, 1965; DeRiver, 1956; Gagnon & Simon, 1967; Galbraith & Mosher, 1968; Gebhard et al., 1965; Karpman, 1954; Leiman & Epstein, 1961; Reinhardt, 1957; Thorne & Haupt, 1966; p.242 of 1970 Commission Report)

4) Statistics on sex offenses reported to the police in Copenhagen, Denmark, from 1958 through 1969 show that the number of sex crimes declined during the period, even though pornography became increasingly available to the general public. The sharpest continuous reduction in sex offences began in 1967 when the Danish Parliament voted to remove erotic literature from its obscenity statute. During 1969, the year that all prohibitions against the dissemination of sexually explicit materials were repealed, sex crimes decreased over 30% from the previous year. The changes in the incidence of sex offenses could not be attributed to legislative change, alteration of law enforcement practices, modified data collection and reporting procedures, or public willingness to report sex crimes. (Ben-Veniste, 1970, p.230-232 of 1970 Commission Report)

5) Advisory commissions in Denmark, Israel, Sweden, and the United

Kingdom have concluded that consensual exposure of adults to explicit sexual materials causes no demonstrable damaging individual or social effects. (p.44 of 1970 Commission Report)

The 1970 Commission concluded that there is "no evidence... that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency." (p.27 of 1970 Commission Report)

I have introduced the 1970 Commission Report findings to show that if the types of erotic materials which the 1970 Commission reviewed (generally less violent than pornographic materials available today) don't lead to violence toward women, certainly simple exposure of women's breasts in nonsexual situations will not either.

However, I believe that any material which is degrading to women, showing them in inferior or demeaning positions, does cause harm. It portrays women as sex objects which damages women's sense of self worth, leads men to view women as subservient, and results in unhealthy relationships of inequality between men and women. Most pornography available today depicts women as enjoying being used as sex objects and may be related to the sexual harassment such as catcalls and suggestive comments to which women are subjected daily.

The recently released Attorney General's Commission on Pornography Final Report, commonly referred to as the Meese Commission Report, supports my beliefs. While finding a relationship between violent pornography and aggressive behavior toward women, the Meese Commission stated, "None of us think that the human body or its portrayal is harmful." (Attorney General's Commission on Pornography Final Report, U.S. Government Printing Office, Washington, D.C., 1986, vol.I, p.347) "We do not find

the nudity that" is not violent or degrading to women "to be much cause for concern." (Ibid., p.349)

My experience in naturist clubs supports the findings of the commissions. Men viewing nude women in natural non-sexual settings in these clubs neither attack the women nor do they even become sexually aroused.

Our experience in Cobbs Hill Park also tends to support the study results. A few minutes after we removed our shirts, several men who had been waiting in anticipation for the "show" remarked, "What's the big deal?" and left. The anticipation of nudity, not nudity itself, seems more sexually stimulating. Skimpy bikinis and peek-a-boo fashions are probably more arousing than nude breasts, but we don't outlaw them.

There is no evidence of an increase in crimes against women in areas of the United States and abroad which allow women to be topfree. The makers of the "Exposure of a Person " law did not postulate any relationship between exposure of women's breasts and violence against women. If they had, they probably would not have exempted entertainment in topless bars where men buy drinks as they watch women move in a manner designed to arouse the men.

Even if exposure of the breasts did tend to increase violence toward women (which it does not), it would not justify the law. It is not fair to punish women (the victims), for the criminal acts of violent men. Such a policy is paternalistic and would set a dangerous precedent.

The final possible government interest is that the exposure of women's breasts in public is offensive to community standards, particularly when children are present. Community standards are difficult to define and measure accurately. Response to our

action in Cobbs Hill has been mixed. Television interviews and letters to the editor reflect a range of viewpoints.

Television station WOKR included views of exposed women's breasts in its news coverage of the action. WOKR News Director Gil Buettner wrote concerning the newscast and the public reaction to it: "It was my decision to show frontal nudity in our story because I felt it was no longer controversial in light of what is shown every day on cable TV. The response of viewers seems to bear out my judgment. We received many calls on the issue of women's right to go topless in public. Only two callers told me they disapproved of us showing bare breasts on our newscast. Compared to the normal feedback we get on stories even less controversial, two calls can not be considered very significant objection."

The exposure of women's breasts in public is not illegal in other parts of the United States. Women swim and sun topfree in a municipal swimming pool and other locations in Austin, Texas. They can sometimes be seen legally topfree in public areas of Santa Cruz, California. As close as Ithaca, New York, although illegal, women regularly enjoy the public swimming spots in the many creeks, particularly Potter's Falls, without bathing suit tops. In the Rochester area, women are increasingly sunning in public, but fairly secluded, locations when they feel the police are not nearby. Women I know report no reaction from passersby when they sun topfree.

There is no federal law requiring women to cover their breasts on federal property. Women often hike and camp in national parks and forests topfree.

Women now enjoy beaches topfree in most European countries.

The sight of women's breasts is not unusual in many areas. Munich, Germany, even has a public park, the English Garden, in the middle of the city where full nudity is the norm.

Magazines such as Cosmopolitan and Sports Illustrated feature women's fashions which would be illegal in New York State since a portion of the breast below the top of the areola can be seen. (See Appendix B.) Evening gowns and bathing suits worn in Rochester often reveal "illegal" parts of the breast.

Women frequently appear without tops in movies today. However that has not always been the case; standards change. Until fifty years ago, it was illegal for men to expose their chests in many parts of New York State. The greatest impetus for change may have been the 1934 movie, "It Happened One Night", in which Clark Gable took off his shirt. Men began to emulate him. In 1935, 42 men were arrested in a single day for being shirtless on a New York beach. In 1936, beach regulations began to change in New York State to allow men to swim without tops.

Women's fashions have also undergone great change. A century ago, women's legs were considered sex objects, not to be seen in public. Then the Bloomer Girls pioneered freedom in leg wear. Slacks, pant suits, swimwear and the bikini followed. Today women are beginning to appear topfree on beaches where laws permit - and sometimes in spite of discriminatory laws.

Opinion polls reflect the changing community standards. Although I am not aware of any polls in this country seeking opinions on women's right to be topfree in public, polls dealing with public nudity indicate change.

In 1976 a Roper poll indicated that 13% of the population responded "yes" to the question, "Have you gone swimming nude or

skinnydipping with a mixed group?" In a July, 1983, Gallup poll, 15% of the population answered "yes" to a similar question. By July, 1985, another Roper poll found that 18% of the population had "swum nude with a mixed group." The Gallup Poll indicated that 72% of the U.S. public approves of social nudity on beaches at which it is accepted.

People magazine of February 10, 1986, provided results of a survey in which it had asked its readers how "guilty" they might feel if they engaged in any of a range of 51 activities from murder and spying to theft and nude sunbathing. Nude sunbathing ranked next to lowest for anticipated guilt, 50 of 51. Making people feel more guilty were use of alcoholic beverages, not voting, smoking, overeating, telling white lies, and cutting into lines. People concluded: "When in doubt, do the least offensive thing: tape a movie off your TV or, lacking a VCR, go nude sunbathing."

Since these polls dealt with total nudity, it can be assumed that the American public would be even more accepting of women being topfree. In France, a poll taken in 1983 found that while only 6% of French women swim totally nude (compared to 9.5% of U.S. women in the 1983 Gallup Poll), 33% swim without tops. Eighty seven percent of the French population approve of women swimming without tops. (Copies of the opinion polls are attached as Appendix C.)

While most women in the United States might not wish to appear in public topfree themselves currently, there is no indication that community standards are opposed to women being able to do so. Certainly in areas of the United States and abroad where women are free to be without tops, there is no

public outcry.

Governor Mario Cuomo's memorandum in support of the "Exposure of a Person" law states, "I am aware that there are parents and children who use public beaches as their major summer recreational experience. This law will protect them from the discomfort caused by unwelcome public nudity." The governor may not be aware that there are many families, mine included, who find discomfort in using a beach at which discrimination against women is the rule, at which women face the discomfort of wearing bathing suit tops. In my experience children are not upset by the sight of women's breasts. In fact, as explained below, it is healthy for children to see the variety of women's breasts that exist in natural settings.

Dr. Alfred Kinsey of the Institute for Sex Research wrote of children and nudity, "We have no indication that exposure of children to nudity, either in the household or elsewhere, has ever been the cause of sexual delinquency." (Pomeroy, Wardell, Dr. Kinsey and the Institute for Sex Research, Harper & Row, New York, 1972, p.246)

Women being topfree in public will undoubtedly offend some people initially. Most social change makes some people uncomfortable. People objected to women wearing slacks in public jobs, pregnant women teaching school, and Black people eating at White only lunch counters. Laws and regulations prohibiting these acts were found to be unconstitutional in spite of the objections. The objections of some people to women being topfree in public do not constitute an important government interest which would allow enforcement of a discriminatory law.

There is no government interest which would justify a law

which allows men but not women to be topfree in public, but there are important government and public interests in striking down such a law.

Requiring women to cover their breasts in public has the following adverse effects:

1) It damages women's body images and self-concepts.

2) It produces an unhealthy obsession with breasts as sexual objects which interferes with the formation of relationships of equality between men and women.

3) It may cause increased violence against women.

4) It discourages breastfeeding.

Requiring women but not men to cover their breasts in public implies that women's breasts are dirty or bad; men's breasts are the norm and acceptable. Girls grow into women being told to put their tops on from a very early age while their brothers and fathers go topfree.

Two recent studies have found that males have more positive body self-concepts than females in our society. They also found that members of social nudist families have more positive body self-concepts than members of nonnudist families. Nudity as a variable was more important than sex in determining self-concept. These studies show the effect of requiring people to conceal parts of their bodies. One of the studies used adult subjects; the other used a sample of three to five year old children. People begin to get the message about the acceptability of their bodies at a very early age. (Story, Marilyn, "Comparisons of Body Self-concept Between Social Nudists and Nonnudists", Journal of Psychology, Sept. 1984, vol.118, p.99-112; Story, Marilyn, "Factors Associated With More Positive Body Self-concepts in

Preschool Children", Journal of Social Psychology, June 1979, vol.108, p.49-56.)

Another study has found that even a one day experience with social nudity may help people to feel better about themselves. (Sussman, Stephen, "Body Disclosure and Self Disclosure - Relating Two Modes of Interpersonal Encounter", Journal of Clinical Psychology, Oct. 1977, vol.33, p.1146-1148.) (The Story and Sussman studies are attached as Appendix D.)

Women's breasts that are portrayed or shown in advertising, the media, and pornography are of the Barbie doll, Miss America type. These forces tend to define women's worth by the size and shape of their breasts.

In real life, the variation in women's breasts is great. Also the shape of women's breasts changes with age. Few women have "Barbie Doll" breasts.

The result of the discrepancy between image and reality is that many women become unhappy with their personal appearance. Demonstrating this principle, a study in the Meese Commission Report "found subjects' judgements of the attractiveness of an average female were lowered by exposure to media females." (Kendrick & Gutierres, 1980, p.990 of Meese Commission Report)

The combination of hiding "dirty" breasts and the media's emphasis on the "ideal" breast as a measure of women's worth leads women to develop poor self-concepts. In our society, symptoms of of this include breast enlargement, breast lift, and breast reduction surgery and uplift bras. The most common cosmetic surgical procedure in the United States today is breast enlargement. A woman, in her efforts to attain "ideal" breasts, runs the risks inherent in surgery and spends $1,500 - $3,000 in

the process. (Green, Laura, "The Brave New World of Cosmetic Surgery", Cosmopolitan, July 1986, p.211-212. - Attached in Appendix D.)

Some girls hide their developing breasts by standing stoop shouldered or wearing baggy clothing; others wear padded bras to "measure up". Older women often disguise their sagging breasts with underwire bras. Poor body image and self-concept can lead to health problems such as depression, overweight, anorexia and bulemia.

The solution to this societal problem is to allow children as they grow to see the full range of breasts on real people in natural settings. Girls growing up in a state which does not force women to conceal their breasts are more likely to accept and appreciate their own breasts regardless of size or shape. There is an important government interest in improving the mental and physical health of its women.

A related effect of requiring women to cover their breasts in public is the unhealthy obsession with women's breasts as sexual objects which the law promotes. The message of the law is that breasts must be concealed except for the sexual gratification of men. This message is delivered in two ways.

First, the suppression of the sight of women's breasts makes them more interesting and desirable. In their research on erotica, both the 1970 Commission on Obscenity and Pornography and the Meese Commission reports found that it is suppression which produces obsession. The studies demonstrated that when people are repeatedly or continuously exposed to erotic material they lose interest in such material and viewing the material ceases to produce sexual arousal. (Howard et al., 1970, p.179-

182 of 1970 Commission Report; Howard et al., 1971, and Zillman & Bryant, 1984, p.995-997 of Meese Commission Report)

The 1970 Commission also reported two studies which showed that erotic material which is implied and left to the imagination leads to higher levels of arousal than when such material is shown explicitly. (Byrne & Lamberth, 1970; Tannenbaum, 1970; p.170-172 of 1970 Commission Report)

Advertising agencies recognize this principal when they use partially hidden breasts to sell all types of products. Women's fashions are designed to accentuate breasts without revealing them.

The second way that the law delivers the message that women's breasts are sexual objects for the pleasure of men is through the exception to the law which allows women to expose their breasts when "entertaining or preforming in a play, exhibition, show or entertainment." This exception is used most commonly to allow topless bars. Thus in New York State it is legal for a woman to bare her breasts while dancing in a sexually provocative way to sell drinks to men but not to enjoy a family picnic on the beach.

Damage to a woman's self-concept is likely to result when her worth is defined by her role as a plaything for men. This objectification of women and their bodies demeans both women and men and hurts the development of a positive relationship of equality between them.

It may also lead to social problems such as the high rate of teenage pregnancy in this country. The Alan Guttmacher Institute in a comprehensive study found teen pregnancy rates in the United States to be far higher than those in other developed countries.

Two of the factors positively related to lower teen pregnancy rates were "media presentation of female nudity" and "the extent of nudity on public beaches." (Jones et al., "Teenage Prenancy in Developed Countries: Determinants and Policy Implications", Family Planning Perspectives, March/April 1985, vol.17, p.54.)

As both previously cited studies (Howard et al., 1970; Byrne & Lamberth, 1970; Tannenbaum, 1970; Howard et al., 1971; Zillman & Bryant, 1984; Jones et al., 1985) and the "What's the big deal?" response to our action in Cobbs Hill Park suggest, the way to reduce the use of women's breasts as sex objects is to have them seen regularly in natural, nonsexual settings. Thus, the current law is incongruent with important government interests in healthy relationships between men and women, the reduction of teenage pregnancy, and the maintenance of women's sense of self-worth.

There is some evidence that concealment of women's breasts may actually lead to increased violence against women. As stated above, the 1970 Commission on Obscenity and Pornography found that persons committing sex crimes had little exposure to nudity and that when erotic material was legalized in Denmark, the incidence of crimes against women was substantially reduced.

Since the 1970 Commission Report, two studies have found that exposure to pictures of nude and seminude women actually inhibited aggressive behavior in male college students. (Baron, Robert A., "Sexual Arousal and Physical Aggression: The Inhibiting Influence of 'Cheesecake' and Nudes", Bulletin of the Psychonomic Society, May 1974, vol.3, p.337-339; Baron, Robert A. & Paul A. Bell, "Sexual Arousal and Aggression by Males: Effects of Type of Erotic Stimuli and Prior Provocation", Journal of

Personality and Social Psychology, Feb. 1977, vol.35, p.79-87) A study cited in the Meese Commission Report also found that exposure to nude and seminude pictures inhibited aggressive responses. (Donnerstein et al., 1975, p.993-994 of Meese Commission Report)

While there is no clear evidence that the legalization of the sight of women's breasts in public would reduce crimes against women, these studies indicate that it might be a possibility. Such a result would surely be in the government's interest.

Finally, Section 245.01 of the N.Y.State Penal Law works against the important government interest that more women breastfeed their infants.

The American Academy of Pediatrics issued a policy statement on breastfeeding in 1979: "Breastfeeding is strongly recommended for full-term infants, except in the few instances where specific contraindications exist." (American Academy of Pediatrics, "Breastfeeding", Pediatrics, 1979, vol.62, p.597)

U.S. Surgeon General C. Harold Koop in his keynote address before the Surgeon General's Workshop on Breastfeeding & Human Lactation held at the University of Rochester in June, 1984, stated, "We must identify and reduce barriers which keep women from beginning or continuing to breastfeed their infants." (Report of the Surgeon General's Workshop on Breastfeeding & Human Lactation, U.S. Government Printing Office, 1984, p.6)

At the Surgeon General's Workshop, David Axelrod, Commissioner of the N.Y. State Department of Health reported that New York has a "commitment to increase the number of mothers who provide their infants with the immunologic, bonding, and other

benefits associated with breastfeeding." (Ibid, p.54)

The N.Y. State "Exposure of a Person" law does contain an amendment (initiated by Rochester groups with which I am associated) which exempts women when engaged in "the breast-feeding of infants". However, it is not the legality that prevents many women from breastfeeding. Many women choose not to breastfeed because they feel uncomfortable publicly exposing their breasts or playing juggling games trying to conceal their breasts while nursing their infants.

Speakers at the Surgeon General's Workshop recognized discomfort with breast exposure as a barrier to increased breastfeeding. (Ibid, p.25,58) The Workshop developed a set of recommendations to encourage breastfeeding. Two of the recommendations dealt with reducing this discomfort:

1)"An on-going media campaign which utilizes public service announcements, features, display ads, posters, printed materials, and role modeling to portray breastfeeding as a community norm and a part of everyday life." (Ibid, p.66)

2)"An educational campaign for public officials ... to remove and prevent laws restricting the practice of breastfeeding in public (e.g., public nudity, indecent exposure)." (Ibid, p.66)

When women begin to see other women with exposed breasts in parks and on beaches, in natural, nonsexual settings, they will begin to feel more comfortable with breastfeeding. As the sight of women's breast's becomes more common, people will cease to stare as they pass women nursing their babies.

Women, even more than men, have a need to expose their breasts in public. The natural function of women's breasts is to feed their babies. The promotion of breastfeeding is an

important government interest which would be served by allowing women as well as men to be topfree in public.

I have demonstrated that Section 245.01 of the N.Y. State Penal Law denies equal protection of the law to women without serving any important government interest which might justify this discrimination. Furthermore, I have shown that Section 245.01 is incongruent with important government interests.

II FREEDOM OF EXPRESSION

I will next show that Section 245.01, as applied in this case, denies citizens the freedom to effectively express important ideas.

Our action at which the defendants removed their shirts at Cobbs Hill Park was planned to communicate ideas as well as to test the constitutionality of Section 245.01 of the N.Y. State Penal Law. The following facts illustrate our committment to using the event to educate:

1)A press release was issued to Rochester newspapers and television and radio stations several days before the event. Distributed with the press release was a two sided flier explaining the importance of the issues involved, particularly the discrimination, paternalism, sexism, and negative impact upon women in requiring women but not men to wear shirts in public. The flier also included a brief history of the struggle for choice in clothing for both men and women. (The press release and flier are attached as Appendix A.)

2)Prior to and after the event, many television and radio interviews were held to discuss issues.

3)The day before the event, two of the defendants held a

lengthy background interview with the joint editorial boards of the two daily Rochester newspapers.

4)On the evening before the event, approximately sixty people attended a meeting at which the issues were discussed.

5)At the event itself at Cobbs Hill Park, people carried signs which called attention to the issues. Messages on the signs included:

SUPPRESSION CREATES OBSESSION - NOT OBSCENE -

GENDER DISCRIMINATION - BREASTS ARE BEAUTIFUL -

WHAT IS INDECENT ABOUT OUR BREASTS - TOPFREE EQUALITY -

DON'T BUST MY BUST - KEEP YOUR LAWS OFF OUR BODIES

6)At the event, defendants and their supporters wore tee shirts displaying our logo, a topfree Statue of Liberty, and the slogan, "EQUAL RIGHTS NOW - SHIRTLESS EQUALITY IN 1986".

7)At the event, the defendants and their supporters discussed the issues involved with many people who had come to the park to observe the action.

The exposure of women's breasts in Cobbs Hill Park was a crucial part of our effort which also included spoken and written expression. As such it was constitutionally protected expression. Numerous U.S. Supreme Court decisions have held that conduct when associated with other forms of protected expression is itself protected. In addition two N.Y. State courts have stated that nudity specifically is protected as speech when combined with some mode of expression which itself is entitled to First Amendment protection. (Chapin and Hollman cases.)

It should be stressed that no person was hurt in any way by our actions.

Our ideas could not have been expressed as effectively

without the dramatic act of actually removing our shirts. In the past, groups with which I am associated have met with area legislators to ask for topfree equality. We could not persuade them even to introduce such a bill. (We did persuade area legislators to introduce a bill in the N.Y State Assembly which would have given municipalities the local option to designate clothing-optional areas, but this bill was not passed.) The groups have also distributed fliers and pamphlets. These efforts resulted in little discussion and no change in the law.

In contrast, our action at Cobbs Hill Park has produced tremendous media attention and an opportunity to challenge the constitutionality of the law. In addition to extensive media coverage in the Rochester area, stories appeared in newspapers in Germany, Japan, and Hong Kong. We conducted radio interviews with stations in San Francisco, Phoenix, Chicago and a number of other cities. Defendants appeared on three national television programs including the Donahue show. We are aware of editorials in six Rochester newspapers and 34 letters to the editor to date. (The press clippings are attached as Appendix E.) People are stopping us on the street to discuss the issues.

There is no way that we could have created as much consideration of the issues by holding meetings or writing letters to the editor.

Thus, removing our shirts is constitutionally protected expression since our action was planned to express important ideas, it was combined with other constitutionally protected forms of expression, it did not injure any person, and it was far more effective than other forms of communication.

III VAGUENESS AND INCONSISTENT ENFORCEMENT

The final constitutional point I wish to raise is that Section 245.01 is vague, difficult to enforce and not enforced consistently.

Several parts of Section 245.01 are so vague and difficult to enforce that a reasonable person would not know when she is subject to arrest. For instance, the law defines "that portion of the breast which is below the top of the areola" as a private part of a woman which must be hidden from public view. That definition is not as clear as it may seem at first.

The portion of the breast which is below the top of the areola depends upon the position of the woman. If a woman is lying face down or bending over almost none of her breast is below the areola since the areola becomes the lowest part of her breast except the nipple. On the other hand, if she is lying on her back, almost all of her breast is below the areola. If she sits or stands upright, the portion of her breast nearest her feet will be below the top of the areola . Lying on her right side, the right side of her breast is below the areola; lying on her left side, the left side of her breast is lowest. If she stands on her head, the portion of her breast nearest her head will be below the areola. The portion of her breast below the top of the areola will change as a woman moves. A portion of the breast which must be concealed in one position may be revealed in another.

Since women's breasts vary tremendously in size and shape including the size of the areola, it is difficult to determine what portion of the breast is below the top of the areola, (even if a woman is standing upright) without undressing the woman in

question. This becomes a real dilemma if a woman is wearing a low cut, v-neck evening gown or a fashionable bathing suit which reveals the sides of her breasts. (See illustrations in Appendix B.)

Other vague wording in Section 245.01 is the requirement that private body parts must be exposed "in a public place" for a person to be guilty. However, "public place" is not defined. If a woman is alone at an isolated section of a park or beach, is she in a public place? What if she is in a nudist park with many other people? Is her own back yard a public place if in view of her neighbors? What about her front yard? What if a woman inside her home walks topfree past a window through which she can be seen from the street? In which cases would a woman be guilty of exposure? The law is not clear.

The two execptions in the law also present a problem. The law does not apply to "the breastfeeding of infants" or "any person entertaining or preforming in a play, exhibition, show or entertainment".

When a woman nurses her baby, must she cover the breast which the baby is not using - or may a woman be completely nude if an infant is at her breast? The law is not clear.

Babies often don't nurse continually. They may suck for a while, rest, and then begin again. At a beach or park, is a woman expected to repeatedly put on and take off her bathing suit top during this process? How quickly must a woman cover her breasts when a baby falls asleep at her breast? Must she instantly put the baby down and cover up? How can a woman or a police officer decide just when a woman with an infant is breaking the law?

The exception to the law for a person entertaining or performing is very broad. A topfree woman playing guitar and singing before an audience at a park is clearly entertaining and thus not violating the law. Female members of the audience who are listening and enjoying the entertainment, however, must keep their shirts on. But what if some of the women join in the singing? May they then remove their shirts as well? Haven't they then become part of the entertainment? What if the woman was performing at a small picnic for family or friends? Would her performance still be protected?

Such questions are not purely hypothetical. During our action at Cobbs Hill Park, one of the defendants, Ramona Santorelli, who occasionally is paid for performing basketball tricks, started spinning a basketball on the tip of one finger to relieve tension. She received applause during this performance. Does that render her topfree status legal? And what about those who sang, "All we are saying is give peace a chance?" Did the law's exception for entertainment apply to those of us singing with a message?

Surely the exception for entertainment is not reserved for women performing topless in a bar to sell drinks to men.

These examples demonstrate the absurdity of the law. An exposed female breast is deemed offensive to community standards until a woman picks up a baby or a guitar. Then the same breasts may be seen.

The "Exposure of a Person" law is not enforced consistently in New York State or even in Rochester. Officials ignore topfree and completely nude sunbathing on some Long Island beaches and at Potter's Falls in Ithaca.

In Rochester, on June 18, 1986, in response to questions from the press about our planned action, Deputy Police Chief Terrence Rickard stated that, "Police officers will arrest the women who remove their shirts only if citizens complain."

Rochester District Attorney Howard Relin asked rhetorically on national television on June 26, 1986, "If the women who removed their shirts at Cobbs Hill would like to do this in a private place, in their back yard, in a secluded area, who would object to this?" Of course, many City backyards are easily visible from neighbor's property. Relin continued on the same television program that, "If we have limited court resources, why put this type of matter into the court?....What should I be using assistant D.A.'s for? Should I be using them to prosecute murder cases and rape cases or should I be using them to prosecute exposure of a person?"

Government officials do not appear to take very seriously enforcement of this law in which there is supposedly sufficient government interest to justify discrimination against women.

Given the questions about what portion of a woman's breasts must be concealed in public, what constitutes a public place, the meaning of the exceptions to the law for breastfeeding and performing, and the government's enforcement policy, a reasonable woman might not know when she is in violation of the law and subject to arrest.

IV CONCLUSION

I have shown that:

1) Section 245.01 of the N.Y. State Penal Law denies women equal protection of the law without serving any important government

interest which might justify this discrimination and that, in fact, it undermines important government and public interests.

2) Section 245.01 of the N.Y. State Penal Law, as applied in this case, interfered with the defendant's freedom to express important ideas effectively.

3) Section 245.01 of the N.Y. State Penal Law is vague and not consistently enforced.

When a woman appears at a Rochester beach or park on a hot summer day surrounded by shirtless men, her required bathing suit top or shirt is a clear badge of inequality. In 1936, fifty years ago, New York State courts began to allow men to appear in public without shirts. Please help make 1986 the year of topfree equality for all.

Dated: August 12, 1986